



Clients, Clinics and Social Justice: Reducing Inequality (and embedding legal ethics) via an LLB portfolio pathway

Journal:	<i>Higher Education, Skills and Work-Based Learning</i>
Manuscript ID	HESWBL-03-2018-0037.R1
Manuscript Type:	Conceptual Paper
Keywords:	law clinic, social justice, human rights, work-based learning, PRME, employability

SCHOLARONE™
Manuscripts

Clients, Clinics and Social Justice: Reducing Inequality (and embedding legal ethics) via an LLB portfolio pathway

Abstract: The Department of Law and Criminology at Edge Hill University (England) introduced a three-module, challenging, and longitudinal portfolio pathway in 2014. In addition to supporting the work of its campus pro-bono law clinic, its underpinning aims were threefold: to enhance and evidence the professionalism of its under-graduate LLB students, to embed a deeper awareness of the (legal) ethics needed for sustainable legal practice, and, most significantly, to highlight the increasing need for socially responsible advocates, able to defend the rights of marginalised, vulnerable clients. Case law, and the ability to both navigate and argue it, is key.

i. Introduction

'Businesses can be involved in human rights violations either as primary perpetrators or as accomplices, aiding and abetting to human rights abuses.' (Cirlig, 2016: 229)

This paper discusses the potential, societal impacts of an innovative, tri-modular, work-based learning pathway to legal practice, arguing that its high-level problem-solving tasks (and its emphasis upon ethical dilemmas) are aimed at fulfilling several of the Six Principles for Responsible Management Education ('PRME'). The (PRME) are a United Nations led initiative generated from the United Nations Global Compact (UNGC): PRME participants agree to abide by its Six Principles: 'to share and learn from each other, and to continuously move toward fulfilment of its purpose' (Waddock, 2010:1). The pedagogy described seeks to honour the spirit of the UN's Global Compact whose principles are clearly 'drawn from existing UN documents and agencies such as the International Labor Organization ('ILO') and the Commission on Human Rights' (King, 2001:485). The focus of the paper is primarily upon the jurisprudential content of the year 2 (Level 5) module *Advanced Lawyers' Skills*, which serves as a sort of 'bridge' between the more generalised, basic year one *Legal Skills* module and the challenging final year, practice-mirroring *Clinical Law* module. Students who

1
2
3 have maintained an overall average of 60% or higher are eligible to apply for a
4 place on the Clinical Law module. At the EHU Law Clinic, the initial client
5 interview is a fact-finding exercise, after which Student Advisors research the
6 relevant law and deploy practical problem-solving skills to identify options for
7 clients. This leads to the drafting of an advice letter which is approved by the
8 Supervising Solicitor or Barrister before being sent out to the client. Considerable
9 emphasis is placed upon team working as an essential skill for legal practice.
10 This latter module (with the Law Clinic itself directed by a practising Solicitor)
11 requires students to accurately advise members of the public on complex legal
12 issues involving difficult matters of social justice (such as, for example, housing,
13 property, commercial and family law cases, debt work, and appeals against
14 criminal convictions.)
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30

31 By the pathway's end 'learning gains' are evidenced via three substantial
32 portfolios of practical, work-based learning tasks (i.e. legal research
33 presentations, skeleton arguments, moots, legal opinion, legal advice) which
34 have at their core a need to reinforce the importance of adhering to professional,
35 ethical principles and codes of behaviour. In terms of evidencing enhanced
36 employability skills, EHU's HESA and TEF figures indicate that employment rates
37 for law graduates have improved significantly, rising from around 55% of graduates
38 taking up graduate level employment four years ago, to a record high of around 75%
39 in the figures for 2017 graduates. Numbers taking the law clinic module over the first
40 four years have also risen from 10 students in the initial cohort to 43 applications to
41 enrol for the next Law Clinic module in 2018/19. The pathway's ethos also reflects
42 also the wider global trends within Legal Education which highlight an urgent need to
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60

embrace 'justice education,' against a backdrop of emergent democracies, globalisation, increasing awareness of the need to respect cultural heritage and inclusivity, and to address issues of community need (Gurpur and Rautdesi, 2014). As Cai (2011:159) has argued, law clinics which focus on international human rights law principles and provisions evidence clearly a 'deepening convergence of international law, domestic law, human rights law, and clinical legal education.' Further, as practitioners (both former and current), the pathway's tutors help build (in accordance with the First Principle of the PRME):

'...the capabilities of students to be future generators of sustainable value for business and society at large and to work for an inclusive and sustainable global economy.'

The assessment methodologies (portfolio, clinical law practice) are clearly grounded in a need to incorporate (rather than simply mirror) 'real work' activities, beyond those of many traditional work-based learning simulations (Hertel and Millis, 2002) The pathway was designed and developed in response to practical suggestions gleaned from a number of focus groups involving key stakeholders (e.g. local employers, charities, alumni, and NGOs). Employers were especially keen to see the often-elusive concept of 'graduateness' (Glover et al, 2002) being framed as encompassing clearly demonstrable signs of legal professionalism, and underpinned by ethical approaches to the realities of modern practice and office management. In terms of embedding law-relevant employability skills, undergraduate LLB students are prepared from induction to regard themselves as capable of becoming compassionate, articulate legal advisors to members of the

public.

The Law Clinic opened in September 2014, and has been operating successfully for nearly four academic years. Initially the client base was limited to students and staff at the University. The remit of the Law Clinic was extended however to include members of the public in 2016, with the agreement of the University's insurers. They had initially been reluctant to permit such a potentially broad client base, but were persuaded in light of the successful first two years of its operation. The work of the Law Clinic involves initial written legal advices, following an interview by two Student Advisors in the presence of a qualified, experienced Solicitor or Barrister holding a current Practising Certificate. By final year the highest-achieving LLB students are offered the chance to actively 'intern' as legal advisors offering pro bono legal advice to clients. In doing so, they are actively addressing issues of social inequality: the north west of England has long been recognised as a region facing profound challenges in terms of unemployment levels and low wages.ⁱⁱ Austerity measures have added further to its various socio-economic and cultural problems.ⁱⁱⁱ This is a useful example of 'the local' mirroring 'the global' however: it can be argued that human rights law has become ever more significant, both here and beyond the jurisdiction, influencing social welfare litigation in both private and public law spheres. The presence of 'ethical aimlessness' in judicial proceedings has the potential however to sideline the substantive legal importance of human dignity, and make lawyers focus instead upon matters of procedural regulation and policy. (O'Cinneide, 2013:43). As Cirlig (2016:229) has also recently noted,

'Traditionally there was a clear divide between human rights law, with a focus on the states' obligations, and business law, with a focus on economic aspects. Nowadays the borders between the two main areas are increasingly blurred, impacting tort law, criminal law, contract law, as

well as investment and commercial arbitration.’

Often litigation involves claims of corporate complicity, thus ‘new actors’ have become more prominent (e.g. NGOs, financial institutions...stock markets) and these can alter a company's reputation, and its ability to access funding. Significantly, there is now a more obvious

‘tendency towards creating or strengthening the mechanisms available at national and international level regarding corporate accountability for human rights violations.’ (Cirlig, 2016:229)

Verbos and Humphries (2015) have similarly argued (albeit in respect of the need to include indigenous groups’ unique vulnerabilities within such academic analyses and learning innovations) that making changes to the ‘critical pedagogy (process) as well as content’ is often key to challenging and transforming those ‘seemingly intractable issues of maldistribution of wealth (and) unequal influence’ within society which clearly demand changes in terms of content, curriculum, and pedagogy, with a sharper focus upon ‘the common good.’ (Muff, 2013). Section *ii* of this article therefore discusses how the module pathway ties to both the Global Compact and the PRME. It argues that the basic legal skills (researching, presenting, and advocacy - as taught in the introductory, year 1, level 4 *Legal Skills* module, the first step on this portfolio-pathway) are essential for building student confidence, not least by enabling further study and setting them up for sustainable careers in law.

Section *iii* examines in some detail the year 2, level 5 module *Advanced*

1
2
3 *Lawyers' Skills*, explaining how its four overlapping portfolio tasks combine to
4 highlight how legal ethics, advocate empathy and human rights law are all
5 significant in relation to the promotion of social justice and ethical norms. The
6 case law analysed (and mooted) in this second, 'bridging' module is particularly
7 relevant given its focus upon welfare, deprivation, socio-economic rights,
8 injustice, and the underpinning need for human dignity. It is critically discussed
9 therefore in section iv, while the work, remit and impact of the Law Clinic is
10 presented for analysis in the article's concluding section.
11
12
13
14
15
16
17
18
19
20
21

22 **ii. Embedding ethics: Induction and transition via the *Legal Skills* module**

23
24
25

26 *'Sustainability is not only a legal or moral issue... it is also a business issue.'* (Berger-Walliser and Shivastava,
27 2015)
28
29
30

31 As Meyer and Stefanova (2001: 501) have observed, the UN Global Compact has
32 increasingly come to define and represent how
33
34
35
36
37

38 '...a new effort ...has been added to a long list of activities at the local,
39 national and international levels to make transnational corporations
40 ('TNCs') better corporate citizens.'
41
42
43
44
45

46 The three-module legal skills and practice-led portfolio pathway developed at
47 Edge Hill University was designed to challenge existing student perceptions on
48 social justice, to broaden their understanding of human rights law and principles,
49 and to sharpen their ability to both accurately interpret and apply its provisions to
50 difficult scenarios grounded in harsh economic realities. Inequalities highlighted
51
52
53
54
55
56
57
58
59
60

throughout the three-module pathway include systemic gender-biases,^{iv} the lack of equitable access to justice,^v institutionalised examples of discrimination (particularly, for example, against elderly or disabled persons^{vi}) and the presence of adult-centric norms in child protection and family law cases.^{vii} Access to justice is key however: as The Legal Services Board's (2012) stresses,

'Access to justice is the acting out of the rule of law in particular or individual circumstances. The tools to achieve that outcome range from *informing the public about their rights*, through routine transactional legal services and *personalized advice*, through to action before tribunals and courts. The agents of delivery are wide and, of course, *legal professionals are at the heart of this*.'^{viii}

The ability to offer accurate legal advice to vulnerable members of the local population by the end of this pathway rests upon the students' capacity to actively engage in independent academic legal research however. A key challenge for staff therefore is to move students away from a general tendency to quickly 'google' brief (often incorrect, inadequately glib) answers to complex questions of law. Academic legal databases demand skills grounded in a useful degree of intellectual ability, resilience and diligence to be navigated correctly and efficiently. Thus, the compulsory, basic (yet comprehensive) 24-week *Legal Skills* module in first year (level 4) is designed to generally prepare nervous freshers to read for an LLB, and more specifically to undertake the optional year 2 (level 5) *Advanced Lawyers' Skills* module. (This module in turn then enables students to apply for a competitive place on the (level 6) *Law Clinic* module, which will see them work directly with the public in their final year, as out-reaching legal advisors in the campus-based Law Clinic.)

The pathway's key purpose is therefore clearly grounded in a need to raise students' awareness of key social justice issues and ethical legal practices: it is designed to

support and offer profession-led 'appropriate challenges' (Eraut, 2007) from the point of pre-induction through to graduation. A pre-arrival, induction activity encourages a sense of profession-relevant 'belongingness' (Yorke, 2016) but also serves to clearly underscore the fact that students are embarking upon a difficult, 'boot-camp' phase on their journey towards professional legal qualification. The message is that from the outset, active learning will be required from them. In other words, they are expected to read diligently, follow instructions, work independently when necessary, embrace collegiate teamwork and engage in reflective peer review, post-process. In year one a diagnostic activity occurs two weeks after induction week: students must write a short discursive piece, properly researched (i.e. non-googled, avoiding polemic), fully and correctly referenced and footnoted, so that they will be able to provide valid authorities and sources for the advice/answers that they will later be giving in moots and indeed throughout their legal career. This diagnostic activity also enables personal tutors to gauge whether students are in need of extra forms of support e.g. in terms of language skills training or essay-writing workshops. By its end, the year-long *Legal Skills* module will have provided a solid grounding in basic, academic legal research skills, requiring students to engage with practical, client care role-play scenarios, which are aimed at honing their communication skills and sense of professionalism.

Professional codes of conduct from the Solicitors Regulatory Authority^{ix} and Bar Standards Board^x are studied in detail and referred to throughout, to promote a greater awareness of the need for consistently professional, ethical behaviours. A 'mini-moot' activity at the end of the year focuses upon one of the core ('Foundations of Legal Practice') modules being studied, such as Tort or Contract Law, and again

requires students to engage in scholarly legal research via appropriate legal databases (e.g. Lexis-Nexis, Heinonline, Westlaw, Bailii) to both find their 'voice', grow in confidence, and work to strict deadlines, constructively, in teams or pairs to problem-solve logically. They must produce professional, shortened versions of formal trial bundles and focussed skeleton arguments and learn to distinguish between matters of fact and points of law capable of forming the subject of legal appeals. Persuasive authorities are permitted within their arguments as they are encouraged to look beyond the jurisdiction of the UK to find alternative approaches to legal (and indeed moral) dilemmas or hard cases, where necessary or appropriate.

For some students the key challenge within this activity is to both verbalise and transcribe articulate arguments coherently and clearly, and to respond quickly to challenging questions from the guest judges and rebuttals from the other side. They must be very familiar with their chosen authorities, able to rapidly think 'on their feet,' and knowledgeable enough to ground answers to complex legal questions within accurate legal analyses. By the end of this module they should have compiled a professional, polished portfolio which offers tangible evidence (to potential employers) of their fledgling ability to engage in meaningful, detailed deconstructions of thorny legal issues. *Panopto*-captured sessions offer the added advantage of allowing students to critically review and reflect upon their performances after the assessment, to see themselves in action as advocates and to thus gauge whether they have fully mastered the art of respectful court etiquette (eye contact, demeanour, courtesy, pronunciation, etc). In sum, this basic but challenging introductory module serves to prepare them for the rigours of their second year, not

least for the intermediary case law-rich module on the pathway to professionalism, *Advanced Lawyers' Skills*.

ii. Ethics, Advocacy, and (Legal) Opinions

'The challenge for scholarship is to build the bridges that can make the reality of home's meanings count where it matters most: in the governance of the real issues and challenges.' (Fox-O'Mahony, 2013: 158)

The second-year, 12-week module (*Advanced Lawyers' Skills*) opens with a conceptual study of Legal Ethics: students have just over two weeks to produce a 1500-word analytical essay on the topic, both in terms of classical and modern theories and applied examples drawn for example from the files of the Solicitors' Disciplinary Tribunal database.^{xi} They are required to look beyond the basic text books and to refer instead to critical works on the subject, as contained in the more challenging academic law journals (e.g. *The Modern Law Review*, *Law Quarterly Review*). Case law involving unethical behaviours (e.g. breaches of confidence, conflicts of interest, data-handling) is discussed in some detail, so that students are able to tie the various theories of ethical behaviour to the serious, far-reaching consequences of breaching prescribed ethical codes of conduct. The legal ethics essay serves therefore not just as an introduction to the notion of legal professionalism but also as a sort of warning: advocates must be mindful of how unethical policies and practices can ruin careers, and easily damage the reputation of the profession which they have chosen to join. As Herring (2014:106) notes however, the teaching of legal ethics is often far from straightforward:

1
2
3
4
5 'The issue here is to ensure that students realise that the rules on lawyers'
6
7 ethics are not meant to supplant the basic principles of behaving properly.
8
9 A study of ethics should not rob someone of ethical common sense.'

10
11
12
13 By requiring students to look in detail at academic authority beyond that of the basic,
14
15 introductory texts of year one, they are being challenged to think about the
16
17 conceptually discrete natures of law, morality, and justice, particularly in terms of
18
19 often ambiguous or conflicting legal and socio-cultural norms. They are given little
20
21 time to 'recover' from the first portfolio task (the essay is due in the third week of the
22
23 semester) as they must attempt to display practical lawyering skills in week 4, when
24
25 they must role-play as clients and legal advisors. By taking clear, coherent
26
27 attendance notes and instructions from 'challenging' clients (who present at a 'mock
28
29 interview' to seek legal advice on difficult social issues) students must quickly gain
30
31 and demonstrate the skills needed to show compassion for troubled, perhaps very
32
33 vulnerable people. Examples of 'clients' have included elderly, anxious, hearing-
34
35 impaired, learning-disabled, illiterate, confused, or non-English speaking persons
36
37 (generally 'played' with varying degrees of enthusiasm by law or drama students).
38
39
40
41
42
43

44 Their roles and queries (allocated and provided by the tutor, respectively) are based
45
46 on recent cases involving challenging human rights issues for example on health and
47
48 social care, housing, contested adoption or social welfare. The key themes are
49
50 vulnerability, non-discrimination, human dignity, and the overarching need for ethical
51
52 conduct on the part of advocates, who must behave in a highly professional manner
53
54 in the face of problematic client behaviours (i.e. tearfulness, silence, anger, anxiety,
55
56
57
58
59
60

1
2
3 confusion, or a downright refusal to accept legal advice). This workplace-simulating
4
5 activity is grounded in the acknowledgement that practising lawyers must cultivate
6
7 and display such key skills as empathy, compassion, patience, and a measure of
8
9 open-mindedness. Often, the students tasked with taking attendance notes are
10
11 surprised that they are likely to encounter such 'difficult' clients, with potentially non-
12
13 justiciable socio-legal issues, in 'real life.'

14
15
16
17
18 Although these sessions tend to be lively, engaging, and eye-opening, they do also
19
20 throw into sharp relief the changing nature of modern legal practice, where factors
21
22 such as austerity measures, finite resources and an ever-shrinking legal aid budget
23
24 have added to the pressures on young advocates. Having adequate access to
25
26 justice (via advice or representation) is no longer, it seems, an automatic feature of
27
28 modern legal systems, especially in times of economic recession or political
29
30 upheavals (such as that of the UK in the wake of the 'Brexit' referendum). And yet,
31
32 some students who might have previously expressed a firm desire to only work
33
34 within lucrative corporate or commercial fields will display curiosity over the role and
35
36 work of NGOs, Citizens' Advice Bureaux or welfare rights centres. They are able at
37
38 least to appreciate that the notions of ethical behaviours, fairness, good governance
39
40 and social justice must be fully explored and understood by those seeking to make a
41
42 career in the business or financial sectors.

43
44
45
46
47
48 The second portfolio task therefore ties directly to this role play session: students
49
50 must carry out fairly advanced legal research into (and present their findings upon)
51
52 the legal problems that they their 'clients' have presented with. These problem
53
54 scenarios are based upon cases that have recently been heard before the domestic
55
56
57
58
59
60

courts. They are examined more fully in the following section, but all involve complex elements of human rights law, domestic and international. Again, some students are often quite shocked at the levels of hardship facing vulnerable clients within this jurisdiction. Their oral presentations (group work-based, with group work itself often becoming a fairly challenging task in terms of having students team-work together successfully, professionally and equitably, to strict deadlines) must be logical, clear and sufficiently detailed, and also avoid the pitfalls of simply reading out printed material from a prepared script or power point slide. A peer-led question and answer session follows, so that presenters must be fully cognisant of their arguments and able to back these up by citing properly referenced, valid legal authorities in a formal bibliography (i.e. case law, statute, academic opinion as contained in relevant, recent journal articles and seminal texts). A concise letter of advice for the client must also be produced, in clear but authoritative terms, again citing relevant legal principles.

The third (and, arguably, the most challenging) portfolio task is the moot. As Hill (2009:3) explains, a moot is 'a simulation or mock version of a hypothetical case in one of the appellate courts.' Students are required to produce a strictly deadlines, formal skeleton argument and fully annotated trial bundle of legal authorities, to support their oral legal submissions. Guest judges provide detailed feedback, and final year LLB students (with experience of having competed in national competitions) attend to offer full and frank peer review. Moot problems are based upon the client care scenarios which were seen in task 2: now, however the cases have moved on either to the Court of Appeal or Supreme Court stage, to focus upon narrow areas of law and judicial interpretations of them (rather than the facts, or the procedural aspects of High Court Judicial Review). Formalities (e.g. court etiquette)

are strictly observed to mirror the realities and rigours of practice: students must also furnish the other side with their skeleton arguments and authorities 48 hours before the Moot, which often means emailing the tutor and the opposing team and submitting work online over the weekend.

A week later, students must submit a 1500-word Legal Opinion on the case that they have mooted on, not as Appellants or Respondents but as neutral jurists, deciding whether or not to uphold or dismiss the appeal on the basis of all of the research done. This fourth and final portfolio task requires them to view the problem once again, both as judges and through the eyes of their opponents, and to weigh up and apply the relevant law which was analysed during the Moot. They should, ideally, conduct further research to find useful authorities beyond those which were included within their trial bundles, (and indeed within those submitted by their opponents, pre-trial). Persuasive authorities from other jurisdictions, and dissenting and *obiter* judgments are particularly welcome, especially given that the moot problems are chosen to represent difficult 'grey' areas of law and hard cases involving thorny socio-legal rights issues. Questions of non-justiciability often arise, given the nature of the appeals. Finite or scarce state resources tend to further hinder the meaningful realisation of already highly qualified socio-economic 'rights' within the fields of social care, welfare, health or housing law. Decisions grounded in principles of social justice, equality and human dignity may seem beyond the reach of many litigants seeking a meaningful juridical solution or practical legal remedy within these areas.

As Chenwi (2008:137) has argued (in respect of the 'right' to access adequate housing), often 'enforcement is the most vital facet' of the process. Where clients

are denied access to legal aid, or to free (or indeed reasonably priced) legal advice or representation, it may be argued that the very notion of accessing justice itself becomes an entirely moot point.

iv. The case law used in *Advanced Lawyers' Skills*: advising, researching and mooted issues of social justice

'...the development of the Global Compact...in its simplest form is the dissemination of and adherence to good business practices, which encompass principles of human rights, principles of the environment and development, and fundamental principles of rights at work.' (King, 2001:482)

As the previous section has outlined, the human rights issues with which students must grapple on this intermediary module are not for the faint-hearted: poverty, homelessness, child abuse, gender discrimination, and unmet need (within the areas of social and health care law) are but some examples of the topics they are expected to very quickly become familiar with. In doing so, students are engaging directly with goals 1, 5 and 16 of The UN's Sustainable Development Goals, which seek respectively to eradicate poverty (1), achieve gender equality (5), and 'promote peaceful, inclusive societies and accountable institutions' (16).^{xii} As King (2001: 482) has noted, the principles seek to underpin 'the protection of human rights...[and] elimination of discrimination.' That many of the rights issues within the module's reading list and case law seem to be often almost entirely non-justiciable is, unfortunately, perhaps the most significant lesson to be learnt from this exercise.^{xiii}

Access to health and social care services is a particularly relevant example. As Miller (2015) has argued, the very notion of a right to human dignity is perhaps essentially

now being 'rationed' within the UK, due to the ongoing austerity measures affecting the NHS (and indeed access to Legal Aid and legal advice). As Callahan (2012: 12) has further observed, previously covert policies of austere regulation have now become blatantly overt with the rights and needs of elderly persons often overlooked (Newdick, 2004, Clough and Brazier, 2014). Case law arising out of austerity measures (for example, on health, social care and housing issues) does however offer useful, if harsh, guidance that is in turn very open to juridical analysis. As Fordham (2013:386) has observed in respect of issues of social justice generally

'Inhuman and degrading treatment is an important baseline. But it is an "on/off switch" focusing on extreme misery, where policy and resources lose any relevance. Social rights have a different virtue.'

The jurisprudence is still very well suited to the aims of the *Advanced Lawyers' Skills* module (and indeed of the module pathway) in terms of highlighting the need for practitioners to have and display high levels of empathy, compassion and awareness of basic human rights principles when handling their case load. The difficult case of *McDonald v UK* (2014)^{xiv} for example touches upon issues of inhuman and degrading treatment, and the concept of human dignity against a backdrop of scarce and dwindling resources. It has recently been used as the basis for three of the portfolio assessments: a client care role-play scenario, follow-up legal research, and the moot.^{xv} The focus of much of the litigation as it made its way through the courts was on procedural rather than substantive rights and there was only limited judicial discussion of the notion of human dignity. As Miller (2015:52) observes, 'in spite of the relationship between health and dignity being clearly acknowledged within the international law on a right to health, there is limited guidance on what dignity means within the jurisprudence on [the right to health as outlined in] Article 12 ICESCR.'

The case still merits close study given that it challenges the statutory decisions of a local authority, on questions of need and health rights.^{xvi} The local council had a duty here to both assess need and then provide for it adequately, subject to resources. (After a stroke, the claimant had only limited mobility and required help with toileting, which placed her at a heightened risk of falling. Her local authority refused to provide night-time help, providing her instead with incontinence pads.) At the Supreme Court stage, the court confirmed the Court of Appeal's earlier decision that there had been no interference with the plaintiff's Article 8 ECHR rights (i.e. the right to be afforded respect for one's home, family, private life and correspondence) but concluded that even if this had have been the case here, such an interference was entirely capable of being justified in law on the basis of the finite, scarce nature of state resources.^{xvii}

The European Court of Human Rights found subsequently that her Article 8 rights had to a limited extent been interfered with, but again this was not unlawful, nor was it disproportionate given the economic context.^{xviii} What was especially significant for the students on this module was the finding that Article 8 ECHR rights were confirmed as capable of giving rise to positive obligations, on the part of signatory states, even though they had not actually done so in the instant case. This was because the local authority's decision had been deemed to have been underpinned by a legitimate aim, namely to promote the economic well-being of the state, and the interests of other care-users. As Miller (2015) observed, the state's decision ...involved issues of general policy which in turn rested upon assessment of priorities 'in the context of the allocation of limited State resources.'

A similar approach was adopted by the courts in relation to a recent, high-profile

case involving 'bedroom tax,' which was also recently explored in this module. In *R (Rutherford) v SSWP* (2014)^{xix} the High Court (for England and Wales) highlighted how ongoing conditions of 'extreme national financial austerity'^{xx} required political decision-makers to embrace a culture of 'acute financial stringency.'^{xxi} In this case a disabled child was in need of round the clock care by his two carers (his grandparents, who were also themselves disabled). Overnight carers also provided respite, without which it was likely that the child would be placed into residential care. Under the new 'bedroom tax' regulations however, there was a shortfall in the amount of their Housing Benefit: disabled children were unable to automatically claim a payment for the 'spare' bedroom needed for an overnight carer. The issue of reasonably 'justified' discrimination was examined in detail (disabled adults' social welfare claims were dealt with under a different scheme) as was the question of the lawfulness or otherwise of the scheme.^{xxii} It was found that any flaws in the social welfare scheme needed to be regarded as 'serious flaws' before the discrimination (between adults and children) would be found to be *unreasonable*.^{xxiii}

Other factors that have been taken into account by the courts in cases such as this have included the numbers of persons who could potentially be affected, and the apparent likelihood of some claimants seeking to abuse the social welfare system. Ultimately it was held that no substantial detriment had been suffered by the claimants here, although it was noted that the Human Rights Act 1998 does require domestic jurists to look beyond basic interpretations, and take the policy aims of legislators into account. As Nield and Hopkins (2013:431) have argued however, there is often a harshly 'stark logic' to property law: where claimants lack truly justiciable property rights they become more vulnerable, and perhaps even more

‘invisible’ to the rest of society. Analysing such difficult issues allows students to seek out and interpret key provisions of human rights law, refer to them in their research presentations, and then rely upon them as valid authorities during moots. Key examples include Article 11 (1) of the International Covenant on Economic, Social and Cultural Rights (‘ICESCR’) which highlights the need for signatory states to aim to provide ‘adequate food, clothing and housing and ... the continuous improvement of living conditions’; Article 2 (1) is often argued in response however, given its qualifying clause on ‘maximum available resources’ (which ties in well with calls for discretionary, economy-dependent decision-making). ICESCR General Comment 3 (on The Nature of State Parties’ Obligations) is also relevant given that students must argue here on the complex issue of adequate housing, via ‘a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights’ contained therein.’^{xxiv} As Fordham (2013: 381) has observed too, that the EU Charter of Fundamental Rights (‘CFREU’) may yet prove to be highly significant, given its focus upon the growing importance of socio-economic rights: ‘...access to such basic resources as ‘food, shelter and healthcare [are] paradigm examples of social rights...They are not new.’^{xxv} And yet, as Hoffman LJ stressed in 2003, in *Matthews v Ministry of Defence*:

‘Human rights include the right to a minimum standard of living, without which many of the other rights would be a mockery...they certainly do not include the right to a fair distribution of resources or fair treatment in economic terms – in other words, distributive justice. Of course distributive justice is a good thing but it is not a fundamental right.’^{xxvi}

v. Conclusion: Accessing social justice via the pro bono Law Clinic

‘...an unfair and unkind universe...divergent responses epitomize the North/South divide on development, income disparities, technology transfer, health, the environment, and related problems.’ (King, 2001:485)

1
2
3
4
5 It is often the case that 'cycles of poverty ...can only be broken through structural
6 reforms'(Muvingi, 2009:163). Within academia generally, there remains an acute
7 need for a much 'sharper focus upon the notion of the greater, common good' to
8 engender a socially conscious, 'new breed of faculty.' (Muff et al, 2013) ^{xxvii} For
9 lawyers, watching the non-enforcement of human rights law in domestic courts can
10 be particularly 'frustrating,' especially where minimum standards and clear rights-
11 thresholds appear absent or ignored (Collingsworth, 2005: 185). Social security
12 issues (health care, welfare benefits, housing) should be seen as having very clear
13 ties to juridical rights: domestic court rooms must be regarded as the protectors of
14 those most at risk of suffering harm. Given also how types of societal injustice and
15 other 'inequalities combine, interact, and are reproduced through interlinked
16 economic, political, and socio-cultural processes,'^{xxviii} the importance of accessing
17 justice at an early stage (not least via pro bono legal advice and assistance) is
18 increasingly key. Lawyers (who often occupy positions of privilege) should aim
19 therefore to be 'not merely visitors, but fully responsible citizens of the communities
20 in which they operate.' (King, 2001: 2) ^{xxix} In terms of challenging socially unjust
21 norms and policies however, there still also exists a clear, geographically-grounded,
22 cultural

23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46 '...divide in solutions to [such] problems: the North advocates human
47 rights, democracy, transparency, responsibilities; the South counters with
48 more aid, trade, and debt forgiveness.'^{xxx}
49
50
51
52
53
54
55
56
57
58
59
60

This pathway's focus upon deprivation and inequality may be framed as striving particularly for the creation of a meaningful 'public space for dialogue among various participants...show[ing] norms creating processes which generate and develop norms continually' (Shoji, 2015:30). Having students argue intricately constructed points of human rights law on thorny issues of social justice essentially brings them full circle back to the linked notions of ethical behaviours and justice promotion which they encountered at the start of this module pathway. Their practical assessments are designed to reinforce the contention that 'social justice or fairness ...is an ethical concept, grounded in principles of distributive justice' (Braveman and Gruskin, 2003: 254). This ties in well with the argument that,

'Policies and programs which rest primarily on a perception of need and powerlessness subtly reinforce the powerlessness of the recipients who are seen as being given justice rather than as receiving their rights. The recognition of entitlement is in itself an act of empowerment.' (Frankovits, 1996:123)

Significantly, the areas of law which have experienced a substantial reduction in public funding in recent years tend to form the bulk of the cases dealt with here: property and family law issues, child law, contact arrangements, and financial support following family breakdown. Additionally, the majority of clients who have attended for advice at the clinic to date have tended to be female, indicating how the work has the potential to directly address gender inequalities. In sum, by providing pro bono legal advice to members of the public, LLB students are contributing to the alleviation of poverty and discrimination, and raising local awareness of human rights principles. The work of the clinic has the potential also to feed directly into social justice litigation both nationally and locally, and indeed to encourage political

lobbying for legislative and policy change. As Luban (2014: 373) has further argued, such a

‘three-cornered conception of rights implicitly brings in law, politics and economics. It envisages institutions to guarantee rights, and to which rights-bearers may tender their demands. It also raises questions of what a ‘social guarantee’ is, and who should bear the costs of socially guaranteeing rights.’

In sum, this pathway raises awareness of the difficulties surrounding ethical business management and client-focussed lawyering, and identifies the barriers that exist in terms of navigating the minefields of social justice (Cirlig, 2016: 229).^{xxxi} In doing so it prepares and equips LLB students for a career in law that is both mindful and respectful of the principles upon which the PRME and the Global Compact were originally founded. They learn that active lawyering has the capacity to influence legislative reform and policy change, and to interpret legal provisions in a manner which achieves meaningful levels of justice for vulnerable, disenfranchised members of society. Whether through advocacy, political lobbying or by advising their corporate clients of their moral obligations, ethical lawyers will be very well placed to help achieve the

‘... ultimate goal of the social compact ... to enlist multinational corporations in the efforts of governments, multilateral institutions and nongovernmental organizations to advance goals of social and economic development, such as reduction in poverty, enhancements in education, improvements in and access to healthcare, equal access to justice, and the universal engagement of human rights.’ (King, 2001: 404)

References

- Berger-Walliser, G and Shrivastava P (2015) 'Beyond Compliance: Sustainable Development, Business, and Proactive Law' 46 *Geo. J. Int'l L.* 417
- Braveman P and Gruskin S (2003) 'Theory and Methods: Defining Equity in Health' *Journal of Epidemiology and Community Health* (57) 254
- Cai Y (2011) 'Global Clinical Legal Education and International Partnerships: A Chinese Legal Educator's Perspective' 26 *Md. J. Int'l L.* 159
- Callahan D (Spring 2012) 'Must We Ration Health Care for the Elderly?' *Journal of Law Medicine and Ethics* 10 – 16
- Chenwi L (2008) 'Putting Flesh on the Skeleton: South African Judicial Enforcement of the Right to Adequate Housing of Those Subject to Evictions' *Human Rights Law Review* 8 (1) 105-137
- Cirrig, R E (2016) 'Business and Human Rights: From Soft Law to Hard Law' 6 *Juridical Trib.* 228-246
- Clough B & Brazier M (2014) 'Never too Old for Health and Human Rights' *Medical Law International* 14(3):133 – 156
- Collingsworth T (2002) 'The Key Human Rights Challenge: Developing Enforcement Mechanisms' *Harvard Human Rights Journal* 15 183
- Eraut M (2007) 'Learning from Other People in the Workplace' *Oxford Review of Education* (2007) 33 (4) pp 403-422
- Fordham M (2013) 'Social Rights' *Judicial Review* 18(4) 379-387
- Fox-O'Mahony L (2013) 'The Meaning Of Home: From Theory To Practice' *IJLBE* 5(2), 156-171
- Frankovits A (1996) 'Rejoinder: The Rights Way To Development: A National Human Rights NGO Speaks On Donor Aid' *Food Policy* (21) 123
- Glover, D, Law S and Youngman A (2002) 'Graduateness and Employability: Student Perceptions of The Personal Outcomes of University Education' *Research in Post-Compulsory Education* (7) 3 pp 296-306
- Gurpur S and Rautdesai R (2014) 'Revisiting Legal education for Human Development: Best Practices in South Asia' *Procedia - Social and Behavioral Sciences* 157 pp 254 – 265
- Herring J (2014) '*Legal Ethics*' OUP: London
- Hill J (2009) '*A Practical Guide to Mooting*' Palgrave MacMillan: London
- Hertel JP and Millis B (2002) '*Using Simulations to Promote Learning in Higher Education: An Introduction*' Stylus Publishing: US
- King, B (2001) 'The UN Global Compact: Responsibility for Human Rights, Labor Relations, and the Environment in Developing Nations' 34 *Cornell Int'l L.J.* pp 481 - 486
- Luban D (2014) 'Is There a Human Right to a Lawyer?' *Legal Ethics* 17(3) pp 371-381
- Meyer, WH and Stefanova B (2001) 'Human Rights, the UN Global Compact, and Global Governance' 34 *Cornell Int'l L.J.* 501
- Miller J (2015) 'Dignity: A relevant normative value in 'access to health and social care' litigation in the UK?' in Diver A and Miller J (eds) '*Justiciability of Human Rights Law in Domestic Jurisdictions.*' Springer: New York pp 51-70
- Muff, K., Dyllick, T., Drewell, M., North, J., Shrivastava, P., and Haertle, J. (2013) '*Management Education For The World: A Vision For Business Schools Serving People And Planet*' Edward Elgar Publishing: UK

Muvungi I (2009) 'Sitting on Powder Kegs: Socioeconomic Rights in Transitional Societies' *The International Journal of Transitional Justice* 3 163-182

Newdick C (2004) *'Who Should we Treat? Rights, Rationing, and Resources in the NHS'*. Oxford University Press: Oxford

Nield S and Hopkins H (2013) 'Human Rights And Mortgage Repossession: Beyond Property Law Using Article 8' *Legal Studies* 33 (3) 431-454

O'Cinneide C (2013) 'Legal Accountability and Social Justice' in Bamforth N. & Leyland P (eds) *'Accountability in the Contemporary Constitution'* Oxford: Oxford University Press pp 385 – 410

Shoji M (2015) 'Global Accountability of Transnational Corporations: The UN Global Compact as a Global Norm' *J. E. Asia & Int'l L.* 8 pp 29-45 p.30

Singh K (2104) *Report of the Special Rapporteur on the right to education* to the Human Rights Council Twenty-third session

Stutt C, (2015) *'A Strategy for Access to Justice: The Report of Access to Justice (2)'* (<https://www.justice-ni.gov.uk/consultations/report-access-justice-review>, accessed 01.03.18)

Verbos A K and Humphries M T, (2015) Indigenous wisdom and the PRME: inclusion or illusion?" *Journal of Management Development*, (34) (1) pp.90-100

Waddock S *et al.*, (2010) 'The Principles for Responsible Management Education – Where Do We Go from Here?' in Fisher *et al* (eds) *'Assessing Business Ethics Education'* Charlotte, NC: Information Age Publishing pp. 13-28

Yorke M (2016) 'The development and initial use of a survey of student 'belongingness', engagement and self-confidence in UK higher education' *Assessment and Evaluation in Higher Education*. (41) 1 pp. 154-166

Case Law

Daly & Ors, R v Secretary of State for Work and Pensions [2016] UKSC 58

M (A Child) [2018] EWCA Civ 240 (20 February 2018)

Matthews v Ministry of Defence [2003] UKHL 4

Mc Donald v UK 4241/12 (2014) 60 E.H.R.R. 1

R (On the Application of McDonald) v Royal Borough of Chelsea and Kensington [2011] UKSC 33

R (On the Application of McDonald) v Royal Borough of Chelsea and Kensington (2010) EWCA 1109

R (On the Application of McDonald) v Royal Borough of Chelsea and Kensington (2009) EWHC 1582 (Admin)

R (Rutherford) v SSWP [2014] EWHC 1631 (Admin)

Re M (Children) [2017] EWCA Civ 2164

Rutherford and others -v- Secretary of State for Work & Pensions and A -v- Secretary of State for Work & Pensions [2016] EWCA CIV 29

The Secretary of State for Work and Pensions v Carmichael & Anor [2018] EWCA Civ 548

ⁱ See Principle One, available at <http://unprme.org/the-6-principles/index.php> (accessed 12.03.18) See further <http://www.unprme.org/about-prme/the-six-principles.php> and <https://www.unglobalcompact.org/library/319> (accessed 01.03.18)

ⁱⁱ See <https://www.gov.uk/government/statistics/english-indices-of-deprivation-2015> (accessed 17.03.18)

ⁱⁱⁱ See https://www.tuc.org.uk/sites/default/files/North%20West%20Final%20Report_2.pdf; <https://www.theguardian.com/society/2015/jan/01/austerity-cuts-2015-12-billion-britain-protest>; <http://www.independent.co.uk/news/uk/home-news/north-of-england-northern-powerhouse-george-osborne-cultural-wasteland-museums-are-hit-by-austerity-a6926321.html> (accessed 18.03.18)

^{iv} See for example *Re M (Children)* [2017] EWCA Civ 2164, where a transgender (male to female) father appealed the High Court's decision to prevent her having contact with her children.

^v See further Stutt C, 'A Strategy for Access to Justice: The Report of Access to Justice (2)' (Sept. 2015) (available <https://www.justice-ni.gov.uk/sites/default/files/consultations/doj/access-to-justice-review-consultation.pdf> accessed 01.03.18.)

^{vi} See for example *The Secretary of State for Work And Pensions v Carmichael & Anor* [2018] EWCA Civ 548 (20 March 2018) on 'bedroom tax'.

^{vii} See for example *M (A Child)* [2018] EWCA Civ 240 (20 February 2018) on significant harm.

^{viii} https://research.legalservicesboard.org.uk/wp-content/media/access_to_justice_measurement_lsrc_conference_sept_2012.pdf (accessed 19.03.18)

^{ix} See further <http://www.sra.org.uk/solicitors/handbook/code/content.page> (accessed 20.03.18) See also the Law Society (England & Wales) on how ethics clearly also 'involves making a commitment to acting with integrity and honesty in accordance with widely recognised moral principles.' (available <http://www.lawsociety.org.uk/support-services/ethics/> accessed 25.03.18)

^x See further <https://www.barstandardsboard.org.uk/regulatory-requirements/bsb-handbook/> (accessed 20.03.18)

^{xi} <http://www.solicitorstribunal.org.uk/> (accessed 22.03.18)

^{xii} See further <http://www.un.org/sustainabledevelopment/sustainable-development-goals/> (accessed 01.02.18)

^{xiii} See further K Singh. *Report of the Special Rapporteur on the right to education* to the Human Rights Council (2014) Twenty-third session, Agenda item 3: Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development (available at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.35_en.pdf accessed 16.03.18) on the various challenges facing justiciability of such rights and on how these are particularly problematic for many disadvantaged groups, not least in relation to the inability to initiate legal proceedings. (para 74)

^{xiv} *Mc Donald v UK* 4241/12 (2014) 60 E.H.R.R. 1

^{xv} *R (On the Application of McDonald) v Royal Borough of Chelsea and Kensington* [2011] UKSC 33; *R (On the Application of McDonald) v Royal Borough of Chelsea and Kensington* (2010) EWCA 1109; *R (On the Application of McDonald) v Royal Borough of Chelsea and Kensington* (2009) EWHC 1582 (Admin).

^{xvi} The National Health Service and Community Care Act (2009): The National Assistance Act (1948); The Chronically Sick and Disabled Persons Act (1947) and The Local Authority Social Services Act (1970). At the Supreme Court stage, there were four issues raised: whether care plan reviews were a reassessment of needs, whether due regard had been afforded to the nature of disabled persons' needs (under statute) and whether any rights arising under Article 8 of the European Convention on Human Rights (ECHR) had been unlawfully interfered with.

^{xvii} Under Article 8 (2) ECHR. See however Lady Hale's sole Dissenting Opinion.

^{xviii} *McDonald V UK* (2014) at para 59. A violation was found to have occurred from November 21st 2008 to November 2009: within that time period, care was not provided in accordance with the social care needs assessment that had been made.

^{xix} *R (Rutherford) v SSWP* [2014] EWHC 1631 (Admin)

^{xx} *Supra* at para 61

^{xxi} *Supra* at para 4. The term 'bedroom tax' was described here as 'a colloquialism' and the *MA* case was praised for its careful detailing of the 'political and legislative background' which had led to the need for welfare reform.

^{xxii} *Supra* at para 35. Dyson MR had stressed that 'the effect of the 2012 Regulations (as amended) in conjunction with the DHP scheme on the position of disabled persons was well understood by Parliament.'

^{xxiii} See however the subsequent appeals: *Rutherford and others -v- Secretary of State for Work & Pensions* and *A -v- Secretary of State for Work & Pensions* [2016] EWCA CIV 29; *Daly & Ors, R v Secretary of State for Work and Pensions* [2016] UKSC 58 (9

^{xxiv} (5th session, 1990) 'any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing....[the state] is, prima facie, failing to discharge its obligations under the Covenant.' Available http://www.bayefsky.com/themes/adequate_general_general-comments.pdf accessed 21.03.15. See also General Comment 4: The Right to Adequate Housing (1991)

^{xxv} As Article 34(3) CFREU states; 'In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Community law and national laws and practices.'

^{xxvi} *Matthews v Ministry of Defence* [2003] UKHL 4 per Hoffman LJ at para 26

^{xxvii} *Muff et al* (*supra*) argue also that the mere acknowledgement of key stakeholders is insufficient; issues such as 'ethical orientation' are often key, in a bid to challenge the predominant models of 'western capitalist thinking' that might be encountered in higher education.

^{xxviii} See 'World Bank World Development Report: Equity and Development' (2006) World Bank: OUP p 28 (available at http://www-wds.worldbank.org/external/default/WDSCContentServer/IW3P/IB/2005/09/20/000112742_20050920110826/Rendered/PDF/322040World0Development0Report02006.pdf accessed 17/03/14)

^{xxix} King (supra) note that 'even where constitutions or bills of social rights have been drafted to protect specific socio-economic rights, there may be little obvious reduction in inequality.' (p. 2)

^{xxx} *Supra* (albeit in relation to the role of human rights law in a global context). Arguably, a not entirely dissimilar approach to global North-South divides might be said to exist in respect of divisive social inequality issues within England and Wales.

^{xxxi} Cirlig (supra) adding that 'primarily it is the states' obligation to put in place proper legislation and to allow access to proper mechanisms to remedy human rights violations.' (p 229)